

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re

INSYS THERAPEUTICS, INC., an Arizona
Corporation, *et al.*,

Debtors.

Chapter 11

Case No. 19-11292 (KG)

(Jointly Administered)

Hearing Date: July 2, 2019 @9:00 a.m. (EDT)
Objections Due: June 25, 2019 @4:00 p.m. (EDT)

Related to Docket No. 29, 55

OBJECTION OF CLASS CREDITORS TO DEBTORS' MOTION FOR (I) ENTRY OF AN ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 502(c) (A) ESTABLISHING PROCEDURES AND SCHEDULE FOR ESTIMATION PROCEEDINGS AND (B) ESTIMATING DEBTORS' AGGREGATE LIABILITY FOR CERTAIN CATEGORIES OF CLAIMS, (II) ENTRY OF PROTECTIVE ORDER, AND (III) SUBORDINATION OF CERTAIN PENALTY CLAIMS

Ronald D. Stracener; F. Kirk Hopkins; Jordan Chu; Amel Eiland; Nadja Streiter; Michael Konig; Eli Medina; Barbara Rivers; Marketing Services of Indiana, Inc.; Glenn Golden, Gretta Golden, and Michael Christy; Edward Grace; Debra Dawsey; Darcy Sherman; Kimberly Brand; Lou Sardella; Michael Klodzinski; Kevin Wilk; Heather Enders; Jason Reynolds; MSI Corporation; Deborah Green-Kuchta; W. Andrew Fox; Dora Lawrence; Michael Lopez; and Zachary R. Schneider (each a "Creditor" and collectively, the "Creditors"), in their individual and representative capacities as set forth below (and with the class members, collectively, the "Class Creditors") in their 25 respective actions in the 25 states identified below (the "Class Actions"), hereby object to Debtors'¹ Motion for (I) Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(c) (A) Establishing Procedures and Schedule for Estimation Proceedings and (B) Estimating Debtors' Aggregate Liability for Certain Categories Of Claims, (II) Entry of Protective Order, and (III) Subordination of Certain Penalty Claims ("Estimation Motion") and in support of the objection, respectfully state as follows:

¹ The Debtors in these chapter 11 cases are Insys Therapeutics, Inc.; IC Operations, LLC; Insys Development Company, Inc.; Insys Manufacturing, LLC; Insys Pharma, Inc.; IPSC, LCC; and IPT 355, LCC.

Background

1. On June 10, 2019, Debtors filed their petitions under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*
2. Pre-petition, Debtor Insys Therapeutics, Inc. (“Insys”) sold Subsys, a prescription opioid, across the country and in the States of Alabama, Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Wisconsin (the “States”).
3. Subsys is an opioid-fentanyl drug approximately fifty times stronger than heroin and one hundred times more potent than morphine. It is part of a special class of drugs, known as transmucosal immediate release fentanyl (“TIRF”), which were approved by the Food and Drug Administration (“FDA”) for the single use of managing breakthrough cancer pain in patients who are tolerant to around-the-clock opioid therapy.
4. Cognizant that selling Subsys only in compliance with its FDA-approved label would not generate the substantial revenue that it desired, Insys devised a subversive and illegal plan to promote Subsys for uses beyond the sole, narrow indication for which it sought and received FDA approval.
5. Specifically, Insys (i) directed its sales force to push healthcare providers to write Subsys prescriptions for more patients and at higher doses to treat chronic pain of any type, despite the known attendant dangers; (ii) paid those prescribers to essentially shill for it through sham speaking and consulting fees and other items of value; and (iii) fraudulently induced insurers to pay for the off-label prescriptions, including by misrepresenting patients’ diagnoses and treatment histories.
6. The opioid epidemic is in part the direct result of Insys’s deliberately crafted, well-funded campaign of deception. For years, it misrepresented the risks posed by the opioids it manufactures and sells, misleading susceptible prescribers and vulnerable patient populations.

As families and communities suffered from the scourge of opioid abuse, Insys earned billions in profits as a direct result of the harms it imposed.

7. Insys knew that its misrepresentations about the risks and benefits of its opioids were not supported by, and sometimes were directly contrary to, the scientific evidence.

8. The explosion in opioid prescriptions and use has created a public health crisis in the States. An oversupply of prescription opioids has provided a source for the illicit use or sale of opioids, while their widespread use has created a population of addicted and dependent patients. When those patients can no longer afford or legitimately obtain opioids, they often turn to the street to buy prescription opioids or even heroin. In addition to the societal impact of deaths, overdoses, and rampant addiction, Insys's conduct has created higher demand and thus higher prices for opioids, as well as the need for expensive medical treatment for a number of insurance-covered health conditions, resulting in increased insurance costs for residents of the States.

9. Insys's conduct has fueled skyrocketing opioid addiction and opioid-related deaths and emergency treatments and has generated huge sales of opioids at inflated prices.

10. The direct and proximate consequence of Insys's misconduct is that every purchaser in the States of private health insurance paid higher premiums, co-payments, and deductibles. Insurance companies have considerable market power and pass onto their insureds the expected cost of future care—including opioid-related coverage. Accordingly, insurance companies factored in the unwarranted and exorbitant healthcare costs of opioid-related coverage caused by Insys and passed them through to insureds in the form of higher premiums, deductibles, and co-payments.

11. Creditor Ronald D. Stracener seeks to hold Insys accountable for the economic harm it has imposed on Alabama purchasers of private health insurance, in the action *Stracener v. Purdue Pharma, L.P., et. al.*, No. 19-cv-86 (S.D. Ala.).

12. Creditor F. Kirk Hopkins seeks to hold Insys accountable for the economic harm it has imposed on Arizona purchasers of private health insurance, in the action *Hopkins v. Purdue Pharma, L.P., et. al.*, No. 18-cv-2646 (D. Ariz.).

13. Creditor Jordan Chu seeks to hold Insys accountable for the economic harm it has imposed on California purchasers of private health insurance, in the action *Chu v. Purdue Pharma, L.P., et. al.*, No. 18-cv-2576 (N.D. Cal.).

14. Creditor Amel Eiland seeks to hold Insys accountable for the economic harm it has imposed on Colorado purchasers of private health insurance, in the action *Eiland v. Purdue Pharma, L.P., et. al.*, No. 18-cv-46283 (D. Colo.).

15. Creditor Nadja Streiter seeks to hold Insys accountable for the economic harm it has imposed on Connecticut purchasers of private health insurance, in the action *Streiter v. Purdue Pharma, L.P., et. al.*, No. 18-cv-1425 (D. Conn.).

16. Creditor Michael Konig seeks to hold Insys accountable for the economic harm it has imposed on Florida purchasers of private health insurance, in the action *Konig v. Purdue Pharma, L.P., et. al.*, No. 18-cv-61960 (S.D. Fla.).

17. Creditor Eli Medina seeks to hold Insys accountable for the economic harm it has imposed on Idaho purchasers of private health insurance, in the action *Medina v. Purdue Pharma, L.P., et. al.*, No. 18-cv-369 (D. Idaho).

18. Creditor Barbara Rivers seeks to hold Insys accountable for the economic harm it has imposed on Illinois purchasers of private health insurance, in the action *Rivers v. Purdue Pharma, L.P., et. al.*, No. 18-cv-3116 (N.D. Ill.).

19. Creditor Marketing Services of Indiana, Inc. seeks to hold Insys accountable for the economic harm it has imposed on Indiana purchasers of private health insurance, in the action *Marketing Services of Indiana, Inc. v. Purdue Pharma, L.P., et. al.*, No. 18-cv-2778 (S.D. Ind.).

20. Creditors Glenn Golden, Gretta Golden, and Michael Christy seek to hold Insys accountable for the economic harm it has imposed on Louisiana purchasers of private health insurance, in the action *Golden et. al. v. Purdue Pharma, L.P., et. al.*, No. 19-cv-1048 (E.D. La.).

21. Creditor Edward Grace seeks to hold Insys accountable for the economic harm it has imposed on Massachusetts purchasers of private health insurance, in the action *Grace v. Purdue Pharma, L.P., et. al.*, No. 18-cv-10857 (D. Mass.).

22. Creditor Deborah Dawsey seeks to hold Insys accountable for the economic harm it has imposed on Michigan purchasers of private health insurance, in the action *Dawsey v. Purdue Pharma, L.P., et. al.*, No. 19-cv-94 (W.D. Mich.).

23. Creditor Darcy Sherman seeks to hold Insys accountable for the economic harm it has imposed on Minnesota purchasers of private health insurance, in the action *Sherman v. Purdue Pharma, L.P., et. al.*, No. 18-cv-3335 (D. Minn.).

24. Creditor Kimberly Brand seeks to hold Insys accountable for the economic harm it has imposed on Missouri purchasers of private health insurance, in the action *Brand v. Purdue Pharma, L.P., et. al.*, No. 18-cv-653 (W.D. Mo.).

25. Creditor Lou Sardella seeks to hold Insys accountable for the economic harm it has imposed on New Jersey purchasers of private health insurance, in the action *Sardella v. Purdue Pharma, L.P., et. al.*, No. 18-cv-8706 (D.N.J.).

26. Creditor Michael Klodzinski seeks to hold Insys accountable for the economic harm it has imposed on New York purchasers of private health insurance, in the action *Klodzinski v. Purdue Pharma, L.P., et. al.*, No. 18-cv-3927 (S.D.N.Y.).

27. Creditor Kevin Wilk seeks to hold Insys accountable for the economic harm it has imposed on North Carolina purchasers of private health insurance, in the action *Wilk v. Purdue Pharma, L.P., et. al.*, No. 18-cv-181 (E.D.N.C.).

28. Creditor Heather Enders seeks to hold Insys accountable for the economic harm it has imposed on Ohio purchasers of private health insurance, in the action *Enders v. Purdue Pharma, L.P., et. al.*, No. 19-cv-448 (S.D. Ohio).

29. Creditor Jason Reynolds seeks to hold Insys accountable for the economic harm it has imposed on Oregon purchasers of private health insurance, in the action *Reynolds v. Purdue Pharma, L.P., et. al.*, No. 18-cv-1911 (D. Or.).

30. Creditor MSI Corporation seeks to hold Insys accountable for the economic harm it has imposed on Pennsylvania purchasers of private health insurance, in the action *MSI Corp. v. Purdue Pharma, L.P., et. al.*, No. 18-cv-1109 (W.D. Pa.).

31. Creditor Deborah Green-Kuchta seeks to hold Insys accountable for the economic harm it has imposed on South Dakota purchasers of private health insurance, in the action *Green-Kuchta v. Purdue Pharma, L.P., et. al.*, No. 18-cv-4132 (D.S.D.).

32. Creditor W. Andrew Fox seeks to hold Insys accountable for the economic harm it has imposed on Tennessee purchasers of private health insurance, in the action *Fox v. Purdue Pharma, L.P., et. al.*, No. 18-cv-194 (E.D. Tenn.).

33. Creditor Dora Lawrence seeks to hold Insys accountable for the economic harm it has imposed on Texas purchasers of private health insurance, in the action *Lawrence v. Purdue Pharma, L.P., et. al.*, No. 18-cv-2889 (S.D. Tex.).

34. Creditor Michael Lopez seeks to hold Insys accountable for the economic harm it has imposed on Utah purchasers of private health insurance, in the action *Lopez v. Purdue Pharma, L.P., et. al.*, No. 18-cv-719 (D. Utah).

35. Creditor Zachary R. Schneider seeks to hold Insys accountable for the economic harm it has imposed on Wisconsin purchasers of private health insurance, in the action *Schneider v. Purdue Pharma, L.P., et. al.*, No. 19-cv-611 (E.D. Wis).

36. Each of the foregoing actions is currently stayed in connection with *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (N.D. Ohio) (the “MDL”). Each Creditor-Plaintiff has brought his or her claims against Insys pursuant to the specific laws of each of the respective States.

37. In order to “resolv[e] their mounting and varied unliquidated litigation claims,” Debtors commenced these bankruptcy proceedings and filed the Estimation Motion. *Estimation Motion* (D.I. 29) at ¶ 1.

The Estimation Motion

38. The Estimation Motion seeks to “establish[] procedures for the Court to estimate certain categories of claims.” *Id.* at ¶ 4.

39. These categories consist of claims brought by several states’ attorneys general (“State AG Claims”); claims brought by various cities, counties, and Native American tribes (“Municipality Claims”); personal injury claims (“Personal Injury Claims”); and claims brought by, or on behalf of, insurance companies and self-funded healthcare plans (“Private Insurer Claims”). *Id.* at ¶¶ 17-20. These claims collectively are called the “Claims Categories.” *Id.* at ¶ 20.

Basis for the Objection

40. Class Creditors support the Debtors’ effort to ensure that the resources available to Debtors’ creditors are appropriately focused on meritorious claims. However, the Estimation Motion suffers from certain deficiencies.

41. The Estimation Motion does not reference or propose estimation proceedings for the Class Actions.

42. The Estimation Motion does not allow for participation of any creditor in the estimation proceedings unless that creditor is a member of one of the Claims Categories. *Id.* at Ex. D.

43. Moreover, even if the Estimation Motion properly allowed the Class Creditors to participate, its prescribed “Estimation Procedures,” enumerated at ¶ 33, do not afford sufficient time to fairly value the Class Creditors’ claims.

44. The Class Creditors’ actions have been indefinitely stayed since being transferred to the MDL, and thus held in abeyance at the most preliminary stage. There has been no dispositive motion practice, written discovery, or depositions conducted in any of the Class

Creditors' cases. Without data or disclosure to review, the Class Creditors have not yet retained industry or econometric experts to value the claims and apportion Insys's fault.

45. Debtors are in possession of the material facts and witnesses, and thus the Class Creditors are at a profound disadvantage in estimating their claims. Additionally, the Class Creditors are uniquely situated among creditors due to their need for third party damages discovery from private health insurance companies in 25 states. Identifying which parties possess that discovery, addressing protective order concerns, obtaining and ultimately processing that discovery will take additional time.

46. Thus, the Estimation Procedures proposed by Debtors, even if properly extended to the Class Creditors' cases, are simply too truncated to fairly and accurately appraise the claims.

Argument

47. Bankruptcy Code Section 502 provides for the estimated allowance of contingent or unliquidated claims, the fixing or liquidation of which would unduly delay the administration of the case. 11 U.S.C. § 502(c)(1). There are no statutory procedures or guidelines for the estimation of claims. Rather, a court may use, "whatever method is best suited to the particular contingencies at issue." *In re: Federal-Mogul Global, Inc.*, 330 B.R. 133, 155 (D. Del. 2005) (internal quotation and citation omitted).

48. Generally, for bankruptcy purposes, state law governs the validity and amount of a claim. *Id.* The Class Creditors' claims are brought under 25 different state law regimes.

49. To liquidate the Class Creditors' claims, Insys would have to litigate in 25 different fora across the nation, subject to class certification discovery, merits discovery, pretrial briefing, and trial procedures.

50. Moreover, to liquidate the Class Creditors' claims, each of the Class Actions must first be exempted from the indefinite stay of the MDL.

51. These claims are unlike any of the claims brought by members of the other Claims Categories, and without a separate claims category during estimation proceedings for the

Class Actions, a vast segment of Debtors' outstanding liabilities will not be represented or estimated.

52. The liquidation of Class Creditors' claims outside of the proposed estimation proceedings would unduly delay the administration of these bankruptcy proceedings.

53. When the liquidation of claims outside of bankruptcy would unduly delay the bankruptcy proceedings, estimation by the court is mandatory. *In re Stone & Webster, Inc.*, 279 B.R. 748, 809 (Bankr. D. Del. 2002).

54. By creating a claims category for the Class Actions, the court will be able to estimate what are likely the largest individual claims against Debtors in these bankruptcy proceedings and allow those claimants to participate on equal footing with the other Claims Categories during the estimation proceedings.

55. Establishing a Class Action claims category will aid in "implementing a fair and efficient process that enables the Debtors (and their creditors) to fix aggregate amounts of particular categories of claims on an expedited basis." Estimation Motion at ¶ 2.

56. However, simply including a Class Action claims category that would account for Class Creditors' claims is not sufficient so long as it is subject to the Estimation Procedures prescribed by the Estimation Motion. Estimation Motion at ¶ 33. While Class Creditors support Debtors' objective of proceeding expeditiously in order to maximize estate assets, any schema must also afford creditors in each claims category due process, including the opportunity to fairly value their claims.

57. Thus, the deadlines pertaining to discovery and experts suggested in the Estimation Procedures must be extended for the Class Creditors. As noted, Class Creditors' actions have been stayed indefinitely in connection with the MDL since filing and transfer. To Class Creditors' knowledge, no action proceeding in state or federal court nationwide that seeks to remedy the opioid epidemic's harm on purchasers of private health insurance has even begun discovery.

58. Unlike all other tort creditors with claims against Debtors, valuation of Class Creditors' claims necessitates significant third-party discovery from private health insurance providers in each of the 25 states implicated by Class Creditors' actions. Upon information and belief, while Debtors interfaced with private insurance companies in order to secure coverage and reimbursement for their prescription products, Debtors did not set health insurance premium, deductible, and co-pays. Thus, while Debtors' culpability in unjustifiably raising the aggregate costs of private health insurance may be demonstrated from documents in Debtors' possession and depositions of Debtors' personnel, tracing that harm to the subscriber level in order to calculate harm on a class wide basis necessitates incremental evidence.

59. The health insurance providers from whom Class Creditors must pursue this essential information are unlikely to tender written and oral discovery on the truncated schedule Debtors propose for two key reasons.

60. First, it may prove contrary to their self-interests. Several health insurance providers implicated in Class Creditors' cases claim to be putative creditors of Debtors' estate. *See, e.g.*, D.I. 88, Notice of Appointment of Unsecured Creditors Committee (appointing Louisiana Health Service & Indemnity Co. d/b/a Blue Cross and Blue Shield of Louisiana and HMO, LA, Inc. to the committee of unsecured creditors). Class Creditors claim that costs associated with Debtors' ill-gotten gains obtained via private health insurance were passed directly to subscribers, while health insurance company putative creditors claim that they themselves bore the costs. By readily complying with Class Creditors' discovery requests, as would be necessary to comply with the truncated schedule specified in Debtors' Motion, health insurance company putative creditors may undercut their own claims for damages.

61. Second, Class Creditors and third-party health insurers must establish protective order and transmission policies for that discovery. Even apart from their potential conflicts of interest, third-party health insurance companies are unlikely to rapidly tender confidential information on the schedule necessary for Class Creditors to use it on the prescribed timetable.

62. Even if Class Creditors manage to obtain the essential discovery from the numerous insurance companies herein implicated, they must tender it to experts for significant econometric analysis. Because Class Creditors' theory alleges a unique pathway of harm on a discrete type of tort claimant, they will need experts with unique competences and experience vis-à-vis those presently retained in the MDL. Identifying and retaining those individuals, never mind enabling them to build essential econometric modeling and apply third-party discovery to those models, will be time-intensive.

63. For the reasons discussed above, the Class Creditors will need at least 42 days to identify their expert, ¶ 33(b), 48 days to serve discovery requests, ¶ 33(d), 42 days to serve discovery requests ¶ 33(e), 28 days to complete fact depositions, ¶ 33(f), 30 days to serve expert reports, ¶ 33(g), 28 days to serve expert rebuttal reports, ¶ 33(h), and 28 days to make expert its expert available for deposition, ¶ 33(i).

Conclusion

For the foregoing reasons, Creditors requests that the Court enter an order (i) sustaining their objection, (ii) establishing a Class Action claims category for the purpose of estimating the Debtors' aggregate liability to the Class Creditors, and (iii) amending the Estimation Procedures applicable to the Class Creditors as detailed herein.

Respectfully submitted,

Dated: June 25, 2019

By: /s/Joseph H. Huston, Jr.
Joseph H. Huston, Jr. (No. 4035)
jhh@stevenslee.com
STEVENS & LEE, P.C.
919 North Market Street, Suite 1300
Wilmington, DE 19801
Tel: 302.425.3310

Nicholas F. Kajon (admitted *pro hac vice*)
nfk@stevenslee.com
STEVENS & LEE, P.C.
485 Madison Avenue, 20th Floor
New York, NY 10022
Tel: 212.319.8500

Ashley Keller*
ack@kellerlenkner.com
Seth Meyer*
sam@kellerlenkner.com
KELLER LENKNER LLC
150 N. Riverside Plaza, Suite 4270
Chicago, Illinois 60606
Tel: 312.741.5220

U. Seth Ottensoser*
so@kellerlenkner.com
KELLER LENKNER LLC
477 Madison Ave., Suite 621
New York, NY 10022
Tel: 516.782.3817

William S. Consovoy*
will@consovoymccarthy.com
J. Michael Connolly*
mike@consovoymccarthy.com
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
Tel: 703.243.9423

James Young*
jyoung@ForThePeople.com
MORGAN & MORGAN, P.A.
COMPLEX LITIGATION GROUP
76 S. Laura St., Suite 1100
Jacksonville, FL 32202
Tel: 904.361.0012

Juan R. Martinez*
juanmartinez@ForThePeople.com
MORGAN & MORGAN, P.A.
COMPLEX LITIGATION GROUP
201 N. Franklin Street, 7th Floor
Tampa, Florida 33602
Tel: 813.223.5505

**Pro Hac Vice* admission pending

Counsel for Plaintiffs and the Putative Classes

CERTIFICATE OF SERVICE

The undersigned certifies that on June 25, 2019, he caused a true copy of the foregoing *Objection of Class Creditors to Debtors' Motion for (I) Entry of an Order Pursuant to 11 U.S.C. §§ 105(a) and 502(c) (A) Establishing Procedures and Schedule for Estimation Proceedings and (B) Estimating Debtors' Aggregate Liability for Certain Categories of Claims, (II) Entry of Protective Order, and (III) Subordination of Certain Penalty Claims* to be served through the Court's CM/ECF system, and that copies will be sent electronically to registered participants as identified on the Notice of Electronic Filing.

/s/ Joseph H. Huston, Jr.
Joseph H. Huston, Jr. (No. 4035)